
U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judge
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FTS 8-454-0514

87-ERA-6 & 87-ERA-40

In the Matter of

JOHN C. REX
Complainant

v.

EBASCO SERVICES, INCORPORATED
Respondent

Billie Pirner Garde, Esquire
Government Accountability Project, WI
104 E. Wisconsin Avenue
Appleton, WI 54911-4897
For The Complainant

Robert Guild, Esquire
Government Accountability Project, SC
314 Pall Mall
Columbia, S.C. 29201
For The Complainant

Lawrence B. Funderburk, Esquire
Scot Chase, Esquire
Firm of Funderburk and Funderburk

1080 Riviana Building
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Houston, TX 77019
For The Respondent

Samuel E. Hooper, Esquire
Raymond L. Kalmans, Esquire
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777 Post Oak Boulevard - Suite 332
Houston, TX 77056
For The Respondent

BEFORE: ROBERT L. RAMSEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
BACKGROUND

This proceeding commenced when counsel for complainant, John Rex, mailed a complaint to the Area Director, U.S. Department of Labor, Wage and Hour Division, 2320 LaBranch, Room 2101, Houston, Texas. In that complaint, Rex alleged that Ebasco Constructors, Inc. ("Ebasco") had discriminated against him in violation of Section 210 of the Energy Reorganization Act, 42 U.S.C. 55851 ("Section 210" or ERA) by terminating his employment as a Heating, Ventilation and Air Conditioning ("HVAC") craft supervisor at the South Texas Nuclear Power Plant ("STP") in Bay City, Texas. Though the termination was effective September 12, 1986, the complaint alleged that Rex did not receive notice of his termination until September 21, 1986. As the envelope which forwarded his complaint was postmarked October 22, 1986, the Area Director determined that the complaint had not been filed within thirty (30) days of the alleged discriminatory event, as required by Section 210(b)(1), and, accordingly, concluded that he did not have jurisdiction to conduct an investigation of the complaint. The Area Director notified Rex's counsel of his determination by letter dated November 7, 1986.

Complainant timely requested a hearing on the complaint to review the determination of the Area Director regarding, the timeliness of the complaint and that request for hearing, Case No. 87-ERA-6, was assigned to Administrative Law Judge Joel R.

Williams. Judge Williams issued a Preliminary Decision and Order on Timeliness of Complaint in which he recommended that Rex's complaint be deemed timely filed and that the merits of the complaint be investigated by the Area Director. On April 13, 1987, the Secretary of Labor ("Secretary") adopted the findings and conclusions of Judge Williams and issued his Decision and Order of Remand to the Wage and Hour

Administrator, directing the Wage and Hour Administrator to conduct an investigation of the merits of Rex's complaint.

Counsel for Rex filed an amended complaint with the Area Director and Chief Administrative Law Judge in which Rex alleged that after being reinstated by Respondent at another facility, he had again been laid off from Ebasco on March 3, 1987 in retaliation for having filed his original Section 210 complaint. In accord with the Secretary's order and the appropriate regulation, 29 C.F.R. § 24.4, the Area Director conducted an investigation into the merits of Rex's original and amended complaints. Upon completion of the investigation, the Area Director issued his determination letter dated July 7, 1987 in which he concluded that Rex's termination by Ebasco from the STP was not due to Rex's involvement in Safeteam Concern No. 11028, nor had Rex been "blacklisted" by Ebasco for having filed a Section 210 complaint.

Complainant timely requested a formal hearing on the merits of his complaint and the matter was assigned to Administrative Law Judge James J. Butler who scheduled the matter for hearing on September 18, 1987, in Seattle, Washington. On Motion by Complainant, the trial setting was continued and the site for conducting the hearing moved to Houston, Texas. Thereafter, counsel for Complainant undertook extensive discovery, commencing with Complainant's First Set of Interrogatories and Request for Document Production which contained some 45 Interrogatories, most with multiple sub-parts and a request for voluminous documents. Interrogatory No. 31 inquired into matters involving William "Billy" Rester unrelated to Complainant's termination of employment from Respondent and to which Respondent objected to providing an answer. Rester had been Ebasco's HVAC manager at the STP and was the individual who had made the selection of Rex to be laid of f in a reduction of force at the STP. However, Interrogatory No. 31 was directed at Rester's personal business activities in catering management lunches for Ebasco and in catering an Ebasco company party.

Complainant continued his discovery through taking depositions

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of Joseph Taylor, Ebasco's former site manager at the STP; Donald Dismukes, Ebasco's HVAC Superintendent at the STP; William Urell, Ebasco's site personnel manager at the STP; and James Blackwood, Ebasco's former mechanical manager and Unit 2 superintendent at the STP. Complainant also noticed for deposition William Rester, however Rester reportly did not appear to be deposed at the time and place set out in the notice. According to Respondent's counsel, in those depositions, counsel for Complainant not only inquired into Rester's catering activities but also inquired into Rester's activities while he was assigned to a construction project in Washington State, including rumors of Rester having arranged "sex parties" and rumors of Rester having been involved in illegal drugs, none of which appear to have any relationship to the charges against the Respondent contained in the complaint or amended complaint.

Complainant also sought to compel Respondent to provide documents relating to investigations conducted regarding Rester's catering activities and allegations that Rester had misappropriated materials from the STP. Respondent objected to providing such documents as they were not relevant to Complainant's Section 210 allegations and were, in the opinion of Respondent, being sought for the purpose of harassing Respondent. Complainant continued to assert that such documents were relevant to his case and Judge Butler ordered Respondent to provide those documents. In complying with Judge Butler's discovery order, Respondent provided Complainant with a copy of a Safeteam Report on Concern No. 11089 which involved an investigation into allegations of improprieties of Rester at the STP.

Complainant also noticed for deposition James Geiger, an employee of Houston Light and Power Company, for January 14, 1988, and included a subpoena duces tecum for Geiger to bring to the deposition all documents, including Safeteam reports, involving either Complainant or Rester. Complainant cancelled the scheduled deposition for Geiger and never sought to reschedule that deposition or significantly, to subpoena or otherwise obtain the records sought from Houston Lighting and Power Company upon which Complainant later allegedly determined he had no provable case.

Complainant also sought to depose the president of Ebasco, Robert Marshall, and the financial officer of Ebasco, Lynn Pett. Respondent moved to quash those notices on the grounds that neither Marshall nor Pett were involved in the layoffs of Rex, nor did

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either have any knowledge regarding the layoff of Rex. Counsel for Rex reportedly asserted that both Marshall and Pett had knowledge of Rester's catering activities and that Marshall had knowledge of Rester's activities at the project in the State of Washington, neither of which subjects were pertinent under the ERA. While Respondent contended that such information would not be relevant to Rex's Section 210 action, counsel for Rex still sought to compel those depositions be taken and Judge Butler, in his discretion, refused to quash the deposition notices.

Respondent sought to depose Complainant on three separate occasions, however, each time that Respondent noticed Rex for deposition he reportedly was not available to be deposed, allegedly due to business travel commitments. Thereafter, Judge Butler indefinitely postponed the hearing until such time as Rex submitted to being deposed. Following the cancellation of the March 22, 1988 hearing date, neither Complainant nor Respondent undertook further discovery. However, in September, 1988, Rex instituted a Texas state civil action against Respondent for wrongful termination.

Once the instant Section 210 case was assigned to Administrative Law Judge Robert L. Ramsey and a hearing was scheduled to be held on April 5, 1989, Respondent again noticed Rex for deposition and scheduled that deposition for Houston. Counsel for Rex announced that Rex would not go to Houston to be deposed unless Ebasco paid his

expenses to travel to Houston. Respondent then sought and obtained an order from the presiding judge compelling Rex to attend the noticed deposition. On the day of Rex's deposition, counsel for Rex, though notified that the deposition was to proceed day to day until completed, announced that she was unable to stay for the completion of Rex's deposition, whereupon the taking of Rex's deposition was suspended. Thereafter, Complainant resisted Respondent's Notice of Continuation of Deposition and moved to quash the Notice.

In this regard, in her oral motion to quash notice of continuation of Complainant's deposition, counsel for Complainant alleged it was necessary for her to leave the original deposition prior to its completion because she had an appointment about sixty miles from Dallas, Texas early the following morning, and the only flight she could catch from Houston to Dallas was at approximately 5:30 p.m. A review of the *Official Airline Guide* indicates, however, that there were 29 flights from Houston to Dallas (225 air miles apart) that evening between 5:30 and 10:30 p.m.

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At the hearing held on April 5, 1989, when the availability of numerous flights between Houston and Dallas was pointed out, Mr. Guild, co-counsel for complainant advised that he had been advised by co-counsel (Ms. Garde) that during the evening and morning following Rex's deposition, the weather "was extremely hazardous, that there was ice and snow on the roads between Dallas and Glenrose, Texas . . . and that it took her several hours to travel late at night and shedidn't arrive until 1:30 [a.m.]". (TR 42,43). Counsel also advised that "there had been a closure of the airport previously that day which backed flights up . . ." According to the best information available, none of those 29 scheduled flights was cancelled due to weather conditions. According to official U.S. Government aviation weather records for the area, attached hereto, the weather at and between Houston and Dallas between 12:46 a.m. and 11:57 p.m. March 6, 1989 was well above the minimus for airline operations, that the area was covered by high pressure, there was no precipitation, cloud cover varied from broken to clear, visibility averaged 15 miles and the wind averaged approximately 10 kts (approximately 11.5 mph) with the highest recorded wind at Houston Hobby Airport of 20 kts gusting to 26 kts at 2:50 p.m. Temperature varied from 20 degrs. to 47 degrs. F over the area during that 24 hour period.

These official weather observations are at variance with counsels statements.

In the interim, counsel for Rex sought to depose three other individuals reportedly for the purpose of making an inquiry as to job availabilities for which Rex might have been qualified following his layoff from Ebasco. In that connection, Respondent made the following individuals available to Complainant's counsel; Doug Barrett, Ebasco's corporate personnel manager; Mike Strehlow, the manager of HVAC engineering for Ebasco Services, Inc. at the Comanche Peak Nuclear Power Project; and Howard

Hildebrandt, the site personnel manager for Ebasco Services, Inc. at the Comanche Peak project.

As Complainant had not continued to seek to depose James Geiger, nor obtain all Safeteam reports involving Rex, Respondent noticed Geiger to be deposed on April 3, 1989, and subpoenaed Geiger to bring Safeteam reports relating to Rex. However, as Houston Lighting and Power Company agreed to provide both Respondent and Complainant with copies of the Safeteam files and did so on April 3, 1989, the deposition of Geiger was cancelled.

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On April 5, 1989, this matter was called for hearing by Judge Ramsey at Houston, Texas. At that time, counsel for Complainant sought leave to file his Second Amended Complaint. Complainant's announced purpose in seeking leave to file the Second Amended Complaint was that the Second Amended Complaint would deprive the Department of jurisdiction over this action because that complaint did not allege any activity protected by Section 210. After hearing argument of counsel, Judge Ramsey, over Respondent's objection, granted Complainant's motion for leave to file his Second Amended Complaint, but ruled that the Second Amended Complaint did not deprive the Department of jurisdiction to hear the matter. Judge Ramsey then ordered Complainant to go forward with his proof, whereupon Complainant requested a continuance. This request was denied and Complainant was ordered to put on his proof. Without offering any evidence or calling a single witness to testify, Complainant's counsel announced that they could not prove the charges of discrimination against Respondent, nor could the Complainant offer any evidence in support of those charges. The Complainant then rested his case. Respondent moved for judgment and for leave to file a motion to recover its attorney's fees and costs incurred in being required to defend this matter. The motion for judgment was taken under advisement and leave to file a motion to recover costs and attorneys fees was GRANTED.

Because Complainant, though given the opportunity to do so, failed to offer either testimony or evidence in support of his claim of discrimination against Respondent, he has failed to make out a *prima facie* case and, in fact, failed to produce any evidence whatsoever tending to show a violation of the ERA, and Respondent is entitled to judgment in its favor, which is hereby GRANTED.

SANCTIONS

Under date of April 14, 1989, counsel for Respondent filed a motion and memorandum in support of his motion for award of costs and attorneys fees. Under date of April 27, 1989, Complainant's counsel pursuant to leave granted filed a response in opposition to Respondents motion. In this response, Complainant's counsel requested a hearing on the issue of imposition of costs and fees. I am of the opinion that counsel's response adequately addressed Respondent's motion and that a hearing on the issue is not

necessary, but would merely cause additional delay and expense. The Complainant's request for a hearing is hereby DENIED.

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In addition to setting forth protected activities, Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, charges the Secretary of Labor with the duty to investigate charges of discrimination under Section 210 and to issue an order either providing relief or denying the complaint. The Secretary's order can only be issued "on the record after notice and opportunity for public hearing." In accordance with the mandate of Section 210, the Secretary has promulgated regulations establishing procedures for the handling of discrimination complaints under federal employee protection statutes. *See* 29 C.F.R. Part 24. Those regulations provide for an investigation to be conducted by the Administrator of Wage and Hour Division, and the right of a party dissatisfied with the determination of the Administrator to request a hearing on the record before an Administrative Law Judge ("ALJ"). While Part 24 sets forth time constraints and the situs for such hearing, Part 24 does not provide for any discovery or delineate any of the powers of the ALJ, other than the power to dismiss the complaint or render a recommended decision. It thus appears that Congress intended these "whistleblower" cases to be speedily investigated and disposed of with a minimum of legal maneuvering with its consequent delays. In actual practice, however, a complainant who desires discovery may waive the speedy disposition requirement and undertake discovery to the extent authorized by the administrative law judge. The power of the ALJ to compel discovery and oversee the proceedings is established by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated by the Secretary, at 29 C.F.R. Part 18 (hereinafter "Rules of Practice").

The Rules of Practice set forth rules generally applicable to proceedings conducted before Administrative Law Judges. Among other matters, the Rules of Practice set forth the qualifications for attorneys to practice before an Administrative Law Judge, 29 C.F.R. 518.34(g)(1), and sets forth standards of conduct for parties and their representatives, 29 C.F.R. § 18.36. The Rules of practice plainly grant the Administrative Law Judge the power to suspend or bar a party or attorney from the proceedings. *See* § 18.36. it is beyond question that administrative agencies, including the Department of Labor, have the authority to promulgate rules for admission and practice before the agency and the power to sanction attorney's for violation of those rules. *Touche Ross & Co. v. SBC*, 609 F.2d 570 (2nd Cir. 1979); see, generally, J. Stein, G. Mitchell and B. Mezines, *Administrative Law*, vol. 5, § 42.02, et seq.

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The Rules of Practice do not specifically provide for the award of attorney's fees and costs incurred by a party in defending a frivilous suit or vexatious conduct of the opposing party or counsel. The Rules of Practice do provide, however, that the Rules of

Civil Procedure for the District Courts of the United States "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1. The Rules of Practice further grant to an Administrative Law Judge the authority to "where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts." 29 C.F.R. 518.29(8). Accordingly, the Rules of Practice adopt, where applicable, the Federal Rules of Civil Procedure and grant to the Administrative Law Judge, where appropriate, the power to take action authorized by the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure are applicable to the instant situation because the Rules of Practice do not speak to the issue of sanctioning parties and their counsel for vexatiously pursuing a groundless Section 210 action. It is certainly appropriate for the Administrative Law Judge to take action authorized by Rule 11 of the Federal Rules of Civil Procedure in the instant case due to the Complainant's and his counsel's abuse of the judicial process in an action which they now agree has no basis in fact. Accordingly, it is appropriate that Respondent recover its costs and attorney's fees incurred in defending this action, responding to irrelevant discovery and preparing for the trial of the matter for the reasons discussed below.

RULE 11 FEDERAL RULES OF CIVIL PROCEDURE

Federal Rules of Civil Procedure, Rule 11, was originally enacted in 1937 and amended in 1983. The current version of the Rule provides as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best

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> of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion or other paper is signed in violation of this Rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. Federal Rules of Civil Procedure, Rule 11, 28 U.S.C.A.

The amended Rule imposes stringent obligations upon litigants and their counsel. In *Hale v. Harney*, 786 F. 2d 688, 692 (5th Cir. 1986), Judge Gee succinctly stated: "The day is passed when our notice pleading practice - circumscribed only by a requirement of

a subjective good faith on the pleader's part - plus liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case or not."

Prior to the 1983 amendment, Rule 11 required only a subjective, good faith belief that there was good ground to support a pleading. *Davis v. Vaslan Enterprises*, 765 F.2d 494, 497 n.4 (5th Cir. 1985). Rule 11 compliance is now measured by an objective, not subjective, standard of reasonableness under the circumstances. *Thomas v. Capital Security Services, Inc*., 836 F.2d 866, 873 (5th Cir. 1988). Rule 11 imposes the following affirmative duties with which an attorney or litigant certifies he has complied by signing a pleading, motion or other document:

> (1) That the attorney has conducted a reasonable inquiry into the facts which support the document;

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> (2) That the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing laws; and
> (3) That the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

The 1983 amendments to Rule 11 now *require* the imposition of sanctions once a violation has been found. Judge Johnson, writing for an *en banc* court, explained the mandatory application of sanctions: "There are no longer any 'free passes' for attorney's and litigants who violate Rule 11. Once a violation of Rule 11 is established, the Rule mandates the application of sanctions". *Thomas v. Capital Security Services, Inc*. 836 F.2d 866, 876 (5th Cir. 1988).

The Advisory Committee note to Rule 11, 97 F.R.D. 165 (1983), makes it clear that the purpose of the revised version of the Rule is to expand the reach of the former Rule and to place a more stringent duty on attorneys. The Rule now imposes an affirmative duty on an attorney to conduct a reasonable inquiry into both the factual and legal basis of any document before signing it. A violation of only one of the two clauses in Rule 11 is sufficient for a Court to impose sanctions. *Robinson v. National Cash Register Co*., 808 F-2d 1119, 1130 (5th Cir. 1987). The determination of whether a reasonable inquiry into the facts has been made in a case is dependant upon the particular facts of each case. *Thomas v. Capital Security Services, Inc*., 836 F.2d 866, 875 (5th Cir. 1988).

Complainant filed his Complaint with the United States Department of Labor on October 21, 1986 pursuant to the Employee Protection Provision of the Energy Reorganization Act, 42 U.S.C. § 5851. The Complaint was signed by Billie Pirner Garde as attorney for Complainant. An Amended Complaint was filed to include the charge of an illegal reduction of force (ROF) from Ebasco on March 3, 1987 in retaliation for the filing of a Section 210 Complaint in october of 1986. The Amended Complaint was also signed by Billie Pirner Garde as attorney for Complainant, John Rex. On April 5, 1989 a Second Amended Complaint was filed by Complainant. The

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Second Amended Complaint was signed by both Billie Pirner Garde and Robert Guild as counsel for Complainant.

On or about July 7, 1987, a certified letter was sent to Complainant, John Rex, in care of his attorney, Ms. Billie Pirner Garde. The letter was sent by Daniel K. Brown, Area Director for the United States Department of Labor. The letter set forth that the Department of Labor investigation did not verify that discrimination was a factor in the action comprising the complaint. The Department of Labor concluded that the allegations were unprovable and set forth the specific reasons. Complainant, John Rex, also had a copy of the results of Safeteam Concerns which outlined the findings of the Safeteam investigators. According to Safeteam reports, the concerns were not substantiated and were not safety related. Attorney Garde was certainly aware of the significance of the Safeteam reports in that she had acted as counsel for Complainants in other cases against Respondent (see *Goldstein v. Ebasco*, 86-ERA-36) in which Safeteam reports were evidence.

It is patently obvious from the documents which were available to Complainant and his counsel both prior to and immediately following the filing of the Complaint, that there was no reasonable factual basis to support the claims. Despite this, Complainant's counsel undertook massive discovery, taking no less than nine depositions over a fifteen month period and required Respondent to produce a massive amount of documents. On April 5, 1989, a hearing was held before Judge Robert L. Ramsey. At this hearing, counsel for Complainant sought and received leave to file a Second Amended Complaint and represented in open court that Complainant had not engaged in any "protected activity", and that the filing of this Second Amended Complaint was for the sole purpose of depriving the Agency (Department of Labor) of jurisdiction. Counsel for complainant attempted to explain their position by stating that they had just received a series of Safeteam documents from Houston Lighting and Power Company including Safeteam Report Concern No. 11028 which convinced them that their client had not, in fact, engaged in "protected activity". As noted above, Safeteam Report Concern No 11028 was relied upon by the Department of Labor's investigator in coming to the conclusion that there was no violation of any protected activity, and the existence of which report was made known to Complainant not later than July 7, 1987. Had counsel looked at Safeteam Report Concern 11028 at that time, it would have been apparent that the complaint was ill-founded.

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Counsel for Complainant engaged in conduct which Rule 11 is specifically designed to prevent. It is clear that counsel for Complainant did not conduct a reasonable inquiry into the facts which allegedly supported the Complaint. A reasonable inquiry could not have led counsel to believe that the Complaint was well grounded in fact. Even a cursory

investigation into the facts at hand as early as July 7, 1987 would have educated counsel for the Complainant as to the obvious lack of merit for the Complaint.

It is further clear by the nature and extent of discovery engaged in by counsel for Complainant that the Complaint was filed for an improper purpose. Specifically, Complainant's discovery appears to have been brought solely for the purposes of harassment of Respondent, Ebasco Constructors, Inc. or for the purposes of a civil suit wherein damages not allowable in this action could be recovered. Rather than seeking to use discovery to develop the factual circumstances underlying the claim that Complainant had been terminated for engaging in protected activity, counsel for the Complainant instead chose to depose many representatives of Respondent who had little or no knowledge as to the facts of the Complaint. During the course of several of the depositions, counsel for Complainant sought confidential information which was damaging, embarrassing and confidential to Respondent and its witnesses and bore no rational relationship whatsoever to the facts sought to be proved in the Complainant's Section 210 action. These specific tactics were set forth in detail in Respondent's Motion for Entry of Protective Order which was filed in this proceeding on or about February 23, 1988. The scope of Complainant's discovery is reflected in Respondent's incurring travel expenses of $4,869.05 (mainly for representing the person being deposed) and deposition transcript costs of $4,084.00. In addition, in responding to interrogatories and subpoena Duces Tecum, Respondent spent literally hundreds of man-hours and thousands of dollars compiling the documents sought by these discovery devices.

That the Complaint was prosecuted in bad faith and for the purposes of harassment or a civil suit is even more evident when one looks at the conduct of Complainant's counsel when the case was called for hearing. Despite the fact that the case had been on file for over two and one-half years and extensive discovery had been completed, counsel for Complainant when forced to proceed, moved for a continuance because her witnesses were not present. Counsel knew that the judge assigned to the case was based in San Francisco and would have to travel to Houston to hear this case.

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Though counsel claimed to have learned of the lack of merit of their case on April 3, 1989, they did not advise the judge that they would not proceed to a hearing in the two days April 3, 4, 1989, prior to the hearing. This in spite of the fact that all parties were advised that the Judge had set aside three days, April 5, 6, and 7, for the hearing. This shows nothing but utter disrespect for the judges' and opposing counsel's time, convenience and expenses. When the motion for continuance was denied, counsel for Complainant failed to call any witness and did not present one piece of evidence in an attempt to pursue their client's claim. Instead, counsel for Complainant announced in open court that they could not prove a discriminatory termination, alleging that the information had only become available on April 3, 1989.

Rule 11 of the Federal Rules of Civil Procedure places an affirmative duty on counsel to conduct a reasonable inquiry into the facts which support the documents that they file. Had counsel for Complainant conducted such a reasonable inquiry into the facts of this case, prior to or shortly after filing of the Complaint, Respondent would have been spared the enormous time and expense to which it has been subjected over the past two and one-half years. This is precisely what Rule 11 was designed to protect against and, in accordance with the amended Rule, the Court is required to impose Rule 11 sanctions upon the finding that Rule 11 has been violated.

The Affidavits of Samuel E. Hooper and Larry B. Funderburk filed pursuant to leave granted set forth that Respondent, Ebasco Constructors, Inc., has been required to incur attorney's fees and expenses in the amount of $77,468.53 in defending the claim which was brought and pursued by Complainant, John Rex. By signing the original First Amended Complaint, Billie Pirner Garde and by signing the Second Amended Complaint, Billie Pirner Garde and Robert Guild, as counsel for Complainant, John Rex, had the affirmative duty to conduct a reasonable inquiry into the facts supporting the claim, not go on an unlimited fishing expedition in hopes that something might turn up. The conduct of Complainant and his counsel can only lead to one conclusion; that the Complaint herein was without foundation and was pursued without justification. Respondent, Ebasco Constructors, Inc., but for the conduct of Complainant and his attorneys, would not have incurred attorney's fees and expenses in the amount of $77,468.53, and Respondent is, under Rule 11 Federal Rules of Civil Procedure, entitled to recover said amount jointly and severally from John

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Rex, Government Accountability Project, and its attorneys Billie Pirner Garde and Robert Guild as sanctions for their baseless and willful conduct in this case which amounted to an abuse of the administrative process.

Recognizing that the imposition of sanctions is unusual, the tendency is to attribute counsels' actions to inexperience, zeal or simply enthusiastic representation. Such is not, however, possible here. The Government Accountability Project has much experience in cases of this type and, in fact, its very name suggests it exists for the purpose of prosecuting "whistleblower" cases such as this. Complainants lead counsel, Ms. Garde, has been involved in cases such as this in the past and has been criticised by trial judges for the manner in which she has pursued cases. *See* Recommended Supplemental Decision and Order in *Goldstein v. Ebasco Constructors* 86-ERA-36, and Recommended Decision and Order in *Hasan v. Nuclear Power Services, Inc*., 86-ERA-24.

Though Mr. Guild became associated with this case only shortly before trial, he had an obligation to fully examine the file and all evidence before agreeing to become involved. Had he done so, the weakness of Complainant's case should have been evident.

I thus cannot attribute to counsels inexperience, zeal or simple enthusiasm, pursuit of this case beyond a point when reasonable investigation would have indicated no violation of any protected activity. Information from which such a conclusion was evident was available in the Safeteam reports about which counsel was well aware, and by the investigative report of the Department of Labor To continue to "beat a dead horse" in the manner here subjects counsel to the sanctions of F.R.C.P. Rule 11.

ORDER

1) The complaint herein is DISMISSED with prejudice.

2) Complainant John C. Rex, Government Accountability Project, and attorneys Billie Pirner Garde and Robert Guild, are jointly and severally ordered to reimburse the Respondent herein the sum of $77,468.53 representing costs and attorney fees incurred by Respondent in defending this groundless action.

ROBERT L. RAMSEY
Administrative Law Judge

Dated: MAY 12 1989

San Francisco, California

RLR:bjh